IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1190

RANDALL O. WALKER,

Petitioner,

v.

GALE S. NEWGENT AND GENERAL MOTORS CORPORATION AND ITS OPEL DIVISION, ITS SUBSIDIARY ADAM OPEL AG,

Respondents.

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION RESTATED

Whether the petition should be granted to review the finding of both the Court of Appeals and the District Court that petitioner failed to sustain his burden of proving the facts necessary for assertion of personal jurisdiction over respondent Adam Opel AG.

STATEMENT OF THE CASE

The "Statement of Case" in the petition, and the petitioner's outline of the facts upon which he relies for his argument (Petition at 8-10), are substantially correct apart from two inaccuracies discussed below. The evidence of record in this case is well summarized in the opinions of the District Court and the Court of Civil Appeals (Appendices A and B to Petition).

Petitioner's statement that the Opel Rekord involved in this case "was designed, manufactured, and marketed by" General Motors Corporation (General Motors) and Adam Opel AG (Opel) (Petition at 4) is false. General Motors had nothing to do with the design, manufacture, or distribution of this automobile. The evidence of record as recited in the opinions of both the District Court and the Court of Appeals establishes beyond question that the Opel Rekord in which petitioner Walker was riding in Germany was designed, manufactured, and sold by Opel in Germany; that it was purchased secondhand in Germany; and that the model in question was not at that time being exported to or marketed in the United States.[1] (Appendix A at 16, 17, 19-20, 21, 22, 24; Appendix B at 27, 30, 32.)

Petitioner has also attempted to mischaracterize the "customer-manufacturer" relationship between General Motors and Opel. He states that Opel intended its automobiles to be exported into the United States "on the orders of the parent, General Motors Corporation." (Petition at 9.) Opel did sell some automobiles to the Buick

[1] Petitioner repeats this misstatement in the summary of facts upon which he relies to sustain his argument for personal jurisdiction over Opel (Petition at 8), but offers no record citation. Both courts below found that the Opel Rekord model involved in this case was not marketed for export to or sale in the United States, but was manufactured solely for Opel's European market. (Appendix A at 17, 24; Appendix B at 30.)

Motor Division of General Motors, which exported them to the United States. (Appendix A at 17, 19, 20-22; Appendix B at 30, 32.) However, there is no evidence that Opel was under "orders" from General Motors to sell or to export its automobiles.

REASONS FOR DENYING THE PETITION

This case turns on petitioner's failure to establish sufficient facts in support of his jurisdictional argument. There is no dispute that Opel is a German corporation, with its principal place of business in Germany. There is also no dispute that Opel does not maintain an office, place of business, agents, servants, employees, or assets within the State of Texas or within the United States. (Appendix A at 16-17; Appendix B at 30.) Petitioner therefore attempts to bring Opel, a nonresident foreign corporation, within the reach of the Texas long-arm statute, article 2031(b), Tex. Rev. Civ. Stat. Ann. (Vernon 1964).

To do so, petitioner must prove facts which show either (1) that Opel itself had "minimum contacts" with Texas; or (2) that the due process requirements of "minimum contacts" and "fairness" are met because of the relationship between Opel and its parent, General Motors. *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316-17 (1945).[2] The Court of Appeals and the District Court

[2] It has been held that the Texas long-arm statute extends personal jurisdiction over nonresidents to the limits of due process. Thus the Texas statutory and the federal constitutional standards of "minimum contacts" and "fairness" are ordinarily equivalent. *See Great Western United Corp.* v. *Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *prob. juris. noted*, 47 U.S.L.W. 3463 (U.S. Jan. 9, 1979) (No. 78-759); *Jetco Electronic Indus., Inc.* v. *Gardiner*, 473 F.2d 1228 (5th Cir. 1973); *U-Anchor Advertising, Inc.* v. *Burt*, 553 S.W.2d 760 (Tex. 1977).

determined that petitioner failed to sustain his burden of showing either set of facts.[3]

1. Opel Itself Had No Contacts with Texas and Its Conduct Had No Foreseeable Effects in Texas.

Petitioner states that a potential defendant's contacts "need not arise from actual physical activity in the forum state; activities in other forums with foreseeable effects in the forum state will suffice." *Great Western United Corp.* v. *Kidwell*, 577 F.2d 1256, 1266-67 (5th Cir. 1978), *prob. juris. noted*, 47 U.S.L.W. 3463 (U.S. Jan. 9, 1979) (No. 78-759). Petitioner contends that Opel's activities in Germany resulted in penetration of American markets and had "foreseeable effects" in Texas. (Petition at 13.)

This is precisely the argument considered and rejected by the Court of Appeals below. (Appendix A at 24-25.) The petition adds nothing new. This case did not arise from activities which had any effect whatsoever in Texas, foreseeable or unforeseeable. The accident in which petitioner Walker was injured did not take place in Texas but in Germany. The accident was unrelated to sales of Opel automobiles in American or Texas markets since the car which petitioner now claims was defective was designed, manufactured, and sold in Germany and would not have been exported to the United States.

The only fact which links this case to the State of Texas is that petitioner is currently residing in Texas. This is not even a "contact" between Opel and the forum, and personal jurisdiction over Opel cannot constitutionally be

[3] Petitioner concedes that, as plaintiff, his burden was to make a prima facie showing of the facts upon which jurisdiction over defendant Opel was predicated. (Petition at 7.) *See Gibbs* v. *Buck*, 307 U.S. 66, 72 (1939); *Product Promotions, Inc.* v. *Cousteau*, 495 F.2d 483, 490-91 (5th Cir. 1974).

based on this fact alone. A plaintiff cannot, by his own unilateral conduct, produce the "minimum contacts" necessary to satisfy the requirements of due process. *Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958).

As the Court of Appeals held below, the contacts between Opel itself and Texas are simply "too attenuated to support in personam jurisdiction." (Appendix A at 25.)

2. The Mere Fact That General Motors Owns 100% of Opel's Stock Is an Insufficient Basis for In Personam Jurisdiction Over Opel.

If a nonresident corporation makes sufficiently appropriate contacts with a forum state through an agent or through a corporate alter ego, constitutional standards of "minimum contacts" and "fairness" are satisfied and assertion of personal jurisdiction over the nonresident can be sustained. *See Product Promotions, Inc.* v. *Cousteau, supra*, 495 F.2d at 492-94; 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1069 at 256, nn. 78 and 79 (1976).

Petitioner does not even contend that the facts of this case establish the traditional elements of an "agency" or an "alter ego" relationship between General Motors and Opel.[4] Both the Court of Appeals and the District Court

[4] An agency relationship requires that General Motors act with either actual or apparent authority on behalf of Opel in Texas, such authority having been created by words or conduct of the principal, Opel. 1 RESTATEMENT (SECOND) OF AGENCY §§ 26, 27 (1958); *Product Promotions, Inc.* v. *Cousteau, supra*, 495 F.2d at 493. The agent must act at the behest of, and under the control of, the principal. *Wells Fargo & Co.* v. *Wells Fargo Express Co.*, 556 F.2d 406, 419 (9th Cir. 1977).

An alter ego relationship requires that the parent, General Motors, so control and dominate the subsidiary, Opel, as to disregard the subsidiary's independent corporate existence. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 52 (1971). *See also Wells Fargo & Co.* v. *Wells Fargo Express Co., supra*, 556 F.2d at 425-26.

held that the facts were insufficient to establish either relationship. (Appendix A at 22-23; Appendix B at 31-33.) Thus, petitioner concedes that those courts were correct insofar as they applied the established law to the proven facts.

Petitioner seeks instead a rule that proof of a parent-subsidiary relationship alone is sufficient to justify personal jurisdiction over the nonresident corporation if its affiliate conducts activities within the forum state, whether or not such activities are related to the case against the nonresident. (Petition at 12-13.)[5] This would be exactly the kind of mechanical and unfair rule governing in personam jurisdiction, the use of which this Court condemned in *International Shoe Co.* v. *Washington, supra,* 326 U.S. at 319. *See also Shaffer* v. *Heitner,* 433 U.S. 186, 204 (1977). Use of the *single fact* of stock ownership to create both "minimum contacts" and "fairness" ignores the teaching of *International Shoe*[6] and would violate the requirements of due process.

Petitioner contends that its proposed rule is sound because this Court's opinion in *Cannon Manufacturing Co.* v. *Cudahy Packing Co.,* 267 U.S. 333 (1925), needs to be reexamined in the light of *International Shoe.* This Court held in *Cannon* that where the formal indicia of separate corporate organization and existence were maintained between a parent and its subsidiary, the physical corporate "presence" of the nonresident corporation required by state law to sustain personal jurisdiction did not exist. The

[5] Clearly, in this case General Motors' activities in Texas were wholly unrelated to petitioner's claim against Opel, since the allegedly defective Opel automobile was not manufactured for export into the United States and the accident itself took place in Germany.

[6] After *International Shoe,* "the relationship among the defendant, the forum, and the litigation . . . became the central concern of the inquiry into personal jurisdiction." *Shaffer* v. *Heitner, supra,* 433 U.S. at 204.

opinion did not reach the due process question, and did not utilize the concepts of minimum contacts and fairness developed under *International Shoe. Cannon* thus is no restraint on a court's finding that if sufficient indicia of identity and control exist between a parent and its subsidiary, the activities of one may satisfy the requirements of due process for assertion of personal jurisdiction over the other.

The holding in *Cannon* has already been reexamined and confined to its proper statutory context. It is now recognized that maintenance of the traditional formalities of separate corporate existence between a parent and its subsidiary will not in and of itself preclude the assertion of jurisdiction over the nonresident corporate entity.[7]

The Court of Appeals below did not premise its due process analysis on *Cannon* or on organizational formalities.[8] Rather, the court looked for facts which might indicate functional corporate control of Opel by General Motors. It found such facts wholly lacking. The court therefore determined that jurisdiction could not, consistent with due process, be asserted over Opel in Texas through its parent corporation.

The Court of Appeals' decision does not conflict with the decision of any other court of appeals on this matter.

[7] *See, e.g., Energy Reserves Group, Inc.* v. *Superior Oil Co.,* 460 F. Supp. 483, 490 (D. Kan. 1978); *Hitt* v. *Nissan Motor Co.,* 399 F. Supp. 838, 849-50 (S.D. Fla. 1975); *Crucible, Inc.* v. *Stora Kopparbergs Bergslags AB,* 403 F. Supp, 9, 12-13 (W.D. Pa. 1975). *See also Product Promotions, Inc.* v. *Cousteau, supra,* 495 F.2d at 492.

[8] Petitioner's assertion that *Cannon* is the law in Texas is belied by the case cited. (Petition at 10.) The district court in *Murdock* v. *Volvo of America Corp.,* 403 F. Supp. 55 (N.D. Tex. 1975) found that the nonresident defendant was beyond the reach of Texas' long-arm statute because the elements of control or agency between parent and subsidiary had not been proven, 403 F. Supp. at 57, and did not premise this holding on the *Cannon* rationale.

Petitioner has cited no case holding that the single fact that a parent-subsidiary relationship exists allows a court to extend the reach of its jurisdiction to the nonresident affiliate which itself has no contacts with the forum. Courts which have considered the question have determined that such an extension of personal jurisdiction would violate the standard of fairness inherent in due process.[9]

Petitioner has advanced no constitutional basis for a rule that the single fact of stock ownership by General Motors is a sufficient predicate for Texas to assert personal jurisdiction over Opel. Nor has petitioner shown that General Motors exercised sufficient control over Opel, or that Opel conveyed sufficient authority to General Motors as its agent in Texas, to satisfy the constitutional standards of *International Shoe*.

[9] *See, e.g., Mizokami Bros. of Ariz., Inc.* v. *Baychem Corp.*, 556 F.2d 975, 977 (9th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978); *Peterson* v. *Crown Financial Corp.*, 435 F. Supp. 901, 904 (D. Neb. 1977); and cases cited in note 7, *supra*.

CONCLUSION

This case was correctly decided on the facts and law by both lower courts. The question presented by the petition provides no basis for the exercise of this Court's powers of review, and the petition for a writ of certiorari should accordingly be denied.

Respectfully submitted,

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